

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Fred J. Clifford

v.

Civil No. 07-cv-244-PB

John Potter, Postmaster General,
United States Postal Service, et al.¹

O R D E R

Pro se plaintiff Fred Clifford has filed suit against several officers of the United States Postal Service ("USPS") pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA"), the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. ("Rehab Act"), the Family Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. ("FMLA"), and 42 U.S.C. § 1983. Clifford alleges that the defendants discriminated against him on the basis of his disability, refused to reasonably accommodate his disability, and illegally terminated him from his position with the USPS. Because plaintiff is proceeding pro se and has paid his filing fee, the complaint is before me for preliminary

¹In addition to John Potter, the plaintiff names these additional USPS employees as defendants to this action: James Adams, New Hampshire/Vermont District Manager and John Steele, Northeast Regional Coordinator.

review to determine whether this Court's subject matter jurisdiction has been invoked. See United States District Court for the District of New Hampshire Local Rule ("LR") 4.3(d)(1)(A).

Standard of Review

Under this Court's local rules, when a plaintiff commences an action pro se, the magistrate judge is directed to conduct a preliminary review. LR 4.3(d)(1)(A). In conducting the preliminary review, the Court construes pro se pleadings liberally, however inartfully pleaded. See Erickson v. Pardus, ___ U.S. ___, 127 S. Ct. 2197, 2200 (2007) (following Estelle v. Gamble, 429 U.S. 97, 106 (1976) and Haines v. Kerner, 404 U.S. 519, 520-21 (1972) to construe pro se pleadings liberally in favor of the pro se party). "The policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts, the court may intuit the correct cause of action, even if it was imperfectly pled." See Castro v. United States, 540 U.S. 375, 381 (2003) (noting that courts may construe pro se pleadings so as to avoid inappropriately stringent rules and unnecessary dismissals of claims); Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997). All of the factual assertions made by a pro se plaintiff and inferences reasonably drawn

therefrom must be accepted as true. See id. This review ensures that pro se pleadings are given fair and meaningful consideration.

Discussion

I. Factual Background

Fred Clifford worked for the USPS for 34 years as a clerk/mail distributor. Clifford alleges that, he has two disabling illnesses, alcoholism and major depression. Clifford asserts that he took time off of work because of these illnesses, and that he was entitled to the time under the FMLA and the Rehab Act. The defendants refused to accommodate Clifford's need for time off, classifying it as unduly burdensome to the USPS. Instead, Clifford's employment was terminated on June 27, 2006 for excessive absences.

Clifford appealed his termination to the Equal Employment Opportunity Commission ("EEOC"). On April 30, 2007, an Administrative Judge at the EEOC ruled that Clifford had not been illegally discriminated against and denied him relief. The USPS entered a final decision affirming that ruling. This action followed the USPS' notification to Clifford that his appeal had been denied.

II. Subject Matter Jurisdiction

Federal Courts are courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co. Of Am., 511 U.S. 375, 377 (1994). The presumption is that a federal court lacks jurisdiction. Id. Consequently, the burden is on the plaintiff who claims jurisdiction to affirmatively allege jurisdiction and prove it. Id.; see also Bender v. Williamsport Sch. Dist., 475 U.S. 534, 541 (1986). To bring a civil action within the court's subject matter jurisdiction, a plaintiff must allege that his action either involves a federal question, or involves citizens from different states and an amount in controversy in excess of \$75,000. See 28 U.S.C. §§ 1331 & 1332. If it appears that the courts lacks subject matter jurisdiction over the matter, the court is required to dismiss the action. Fed. R. Civ. P. 12(h)(3).

Clifford has filed suit specifically alleging causes of action under § 1983, the ADA, the FMLA, and the Rehab Act. Plaintiff has therefore invoked the federal question jurisdiction of this Court. See 28 U.S.C. §1331 (authorizing District Court

jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States.").²

III. Service

Plaintiff is required to serve a summons and a copy of the complaint upon a defendant to a civil action within 120 days of the date the complaint was filed or else the court may dismiss the case for failure to prosecute. Fed. R. Civ. P. 4(m).³ As of November 15, 2007, 101 days after the complaint in this case was filed, the plaintiff has filed neither summonses for processing nor any certificate of service indicating that either of the


²For purposes of preliminary review, the plaintiff has also adequately alleged that he has exhausted his administrative remedies, to the extent such exhaustion may be necessary, to establish this Court's subject matter jurisdiction. I make this finding only for purposes of preliminary review, and without prejudice to the defendants' ability to raise the issue of exhaustion of administrative remedies at a later date.

³Fed. R. Civ. P. 4(m) states:

[T]he court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

defendants have been served with a copy of the complaint.⁴ In accordance with Fed. R. Civ. P. 4(m), plaintiff is hereby notified that this case may be dismissed without prejudice on December 4, 2007, unless the Court receives return of service documents or a motion to extend time to effect service by that date.

SO ORDERED.



James R. Muirhead
United States Magistrate Judge

Date: November 16, 2007

cc: Fred J. Clifford, pro se

⁴The Court's docket in this case indicates that summons were issued by mail on August 9, 2007.